LIBRARY
SUPREME COURT, U. S.

FILED
NOV 2 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 685

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

MORTON LIFTIN

818 Eighteenth Street, N. W.
Washington, D.C. 20006

Attorney for Petitioner

TABLE OF CITATIONS

Bowe v. Scott, 233 U.S. 658 3

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 3

Cohen v. Hurley, 366 U.S. 117 . . . . . 2, 3

Great Northern Railroad Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 3

Illinois Central Railroad Co. v. Kentucky 218 U.S. 551 3

Knapp v. Schweitzer, 357 U.S. 371 2

Lerner v. Casey, 357 U.S. 468 2

Malloy v. Hogan, 378 U.S. 1 3

Nelson v. Los Angeles County, 362 U.S. 1 2

Spevack v. Klein, 385 U.S. 511 3

State Farm Ins. Co. v. Duel, 324 U.S. 154 3

Whitney v. California, 274 U.S. 357 3

IN THE

Supreme Court of the United States

October Term, 1967

No. 685.

SIDNEY J. UNGAR,

Petitioner,

v.

THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

---

1. The present petition for a writ of certiorari is directed to the holding of the Appellate Division on April 25, 1967, as one of the grounds for its denial of petitioner's motion for reconsideration, that the Federal privilege against self-incrimination "does not inhibit the use in a disciplinary proceeding of testimony" compelled under a grant of immunity because "the Fifth Amendment proscribes compelled testimony in 'any criminal case' " and "it has not been held that a disciplinary proceeding is in the nature of a ciminal cause." Since the court below did not address itself to the scope of

the federal privilege against self-incrimination in the prior proceedings but did so in the manner indicated above only in denying petitioner's motion for reconsideration, the present petition obviously seeks review of the Appellate Division's order denying reconsideration in partial reliance on its interpretation of the Federal Constitution and is, in no sense, as contended by respondent, a petition for rehearing of the denial of his earlier petition for certiorari.

2. In reiterating the argument that petitioner abandoned any claim arising under the federal privilege against self-incrimination, respondent quotes a portion of an affidavit of counsel submitted in opposition to a motion to strike the affirmative defense asserting the privilege. Counsel acknowledged in the portion quoted that reliance upon the self-incrimination provisions of the federal constitution did not appear to be well grounded. Respondent's quotation from the affidavit omits, however, the sentence immediately following the language quoted in which petitioner's counsel objected to striking the reference to the federal constitutional privilege against self-incrimination because of his continued reliance on "his right to due process of law under the Federal and State Constitutions." [1] Respondent's argument, therefore, is reduced to nothing more than an exercise in semantics. The acknowledgement of doubt as to the validity of a constitutional claim does not constitute abandonment particularly since any doubts that may have been entertained with respect to the availability of the privilege to an attorney in a state proceeding were clearly justified by this Court's decisions at the time. See, e.g., *Cohen v. Hurley*, 366 U.S. 117; *Nelson v. Los Angeles County*, 362 U.S. 1; *Lerner v. Casey*, 357 U.S. 468; *Knapp v. Schweitzer*, 357 U.S. 371.

---

[1] The pertinent portion of the affidavit in question is set forth in full in the Appendix to the petition, page A-7.

In any event, the claimed abandonment of the privilege is rendered irrelevant by petitioner's renewed reliance upon it after this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1, rejecting prior decisions holding the federal privilege against self-incrimination inapplicable to the states, and *Spevack v. Klein*, 385 U.S. 511, overruling *Cohen v. Hurley* and holding that the privilege may be invoked by attorneys with impunity. These decisions constituted supervening events which permitted the constitutional question to be raised again by petitioner's motion for reconsideration. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v Hill*, 281 U.S. 673. Moreover, the federal constitutional question raised by the motion for reconsideration is appropriately presented for review by this Court since it was considered and passed upon by the court below. *Illinois Central Railroad Co. v. Kentucky*, 218 U.S. 551; *Bowe v. Scott*, 233 U.S. 658, 663; *Great Northern Railroad Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367; *Whitney v. California*, 274 U.S. 357, 360.

3. Respondent argues against the grant of certiorari for the reason that *Spevack v. Klein, supra*, did not hold disbarment to be a criminal penalty within the scope of the privilege against self-incrimination. Although respondent's brief in opposition implies the contrary, petitioner does not urge that certiorari be granted because *Spevack v. Klein*, 385 U.S. 511, decided the Fifth Amendment question here in issue, but rather because it did not. It is precisely because the Court's decisions in *Spevack v. Klein* and other cases leaves unresolved this important question that petitioner urges certiorari should be granted. The petition discusses a number of decisions of this Court which suggest that the constitutional question considered and passed upon by the court below was probably incorrectly decided. As the petition points out, this interpretation of the Federal Constitution will

undoubtedly be the rule of decision in a number of other disciplinary proceedings. The case, therefore, is an appropriate one for the Court's exercise of certiorari jurisdiction.

Respectfully submitted,

MORTON LIFTIN

818 Eighteenth Street, N.W.
Washington, D. C. 20006

Attorney for Petitioner